FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 10 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 277

ARNOLD BERNSTEIN, also known as
ARNOLD M. BERNSTEIN,
Petitioner,

against

VAN HEYGHEN FRERES SOCIETE ANONYME,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS CONNICK,
Counsel for Respondent,
Appearing specially,
120 Broadway,
New York, N. Y.

SIMPSON THACHER & BARTLETT,
Of Counsel

INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Statement 2

Questions Presented 4

Summary of Argument 5

POINT I—Petitioner's Pleading Was Correctly Interpreted Below. There Is No Need for Re-Interpretation 5

POINT II—The Courts Below Correctly Applied the Doctrine That Our Courts Will Not Inquire Into the Acts of a Sovereign Government 10

Conclusion 14

Appendix 15

TABLE OF CASES

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347 (1909) 11, 12

Auerbach v. *Internationale W. Lampen A. Gesellschaft*, 177 Fed. 458 (C. C., S. D. N. Y., 1910) 7, 8

Banco de Espana v. *Federal Reserve Bank of New York*, 114 F. (2d) 438 (C. C. A. 2d, 1940) 11, 12

Cold Metal Process Co. v. *McLouth Steel Corp.*, 126 F. (2d) 185 (C. C. A. 6th, 1942) 7

PAGE

Davis v. *Ensign-Bickford Co.*, 139 F. (2d) 624 (C. C. A. 8th, 1944) 7

Eisner v. *Vereinigte Industrie-Betriebe Fuer Den Osten*, 61 N. Y. S. (2d) 110 (Sup. Ct. N. Y. Co., 1946), *aff'd*, 62 N. Y. S. (2d) 603 (App. Div. 1st Dept., 1946) 14

Georgis v. *Giocalis*, 255 App. Div. 577, 233 N. Y. Supp. 16 (1st Dept., 1929) 8

Grassi v. *La Sociedad Bancaria Del Chimborazo*, 213 App. Div. 629, 210 N. Y. Supp. 705 (1st Dept., 1925) 9

Guaranty Trust Company v. *United States*, 304 U. S. 126, 139-41 (1938) 12

Holzer v. *Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474 (1938) 11, 14

Kehaya v. *Axton*, 30 F. Supp. 838 (S. D. N. Y. 1940) 7

Kleve v. *Basler Lebens-Versicherungs-Gesellschaft*, 182 Misc. 776, 45 N. Y. S. (2d) 882 (Sup. Ct., N. Y. Co., 1943) 12, 14

Magnum Import Co. v. *Coty*, 262 U. S. 159 (1923) .. 7

Mayer v. *Hungarian Commercial Bank of Pest*, 21 F. Supp. 144 (E. D. N. Y., 1937) 7

McCarthy v. *Reichsbank*, 259 App. Div. 1016 (2d Dept. 1940) *aff'd*, 284 N. Y. 739 (1940) 7, 14

Miller Bros. Construction Co., Inc. v. *Thew Shovel Co.*, 248 App. Div. 150, 288 N. Y. Supp. 944 (1st Dept., 1936) *appeal denied* 272 N. Y. 678 8

Page v. *Arkansas Natural Gas Corp.*, 286 U. S. 269, 271 (1932) 6

Ricaud v. *American Metal Co.*, 246 U. S. 304 (1918).. 12

Southern Power Co. v. *N. C. Public Service Co.*, 263 U. S. 508 (1924) 6

PAGE

Texas & N. O. R. R. Co. v. *Brotherhood of Railway & S. Clerks,* 281 U. S. 548, 558 (1930) 6

Underhill v. *Hernandez,* 168 U. S. 250 (1897) ..10, 11, 12
Union Shipping & Trading Co. v. *United States,* 127 F. (2d) 771 (C. C. A. 2d, 1942) 11
United States v. *Belmont,* 301 U. S. 324 (1937) 11
United States v. *Commercial Credit Co.,* 286 U. S. 63, 67 (1932) 6
United States v. *Johnston,* 268 U. S. 220 (1925) 6
United States v. *Pink,* 315 U. S. 203 (1942) 13

Wade v. *Gates Rubber Co.,* 205 App. Div. 17, 20, 199 N. Y. Supp. 16, 18 (1st Dept., 1923)..... 9
Williams v. *Bruffy,* 96 U. S. 176, 185 (1877)..... 12
Wulfsohn v. *Russian Socialist Federated Soviet Republic,* 234 N. Y. 372 (1923), *appeal dismissed,* 266 U. S. 580 .....8, 11

RULES OF PROCEDURE

New York Civil Practice Act, Section 949..... 9
Rule 64, Federal Rules of Civil Procedure..... 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 277

ARNOLD BERNSTEIN, also known as ARNOLD M. BERNSTEIN,
Petitioner,

against

VAN HEYGHEN FRERES SOCIETE ANONYME,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

Neither the opinion of the District Court (50)* nor the opinion of the Circuit Court of Appeals (61) has as yet been officially reported.

Jurisdiction

The order of the Circuit Court of Appeals sought to be reviewed was entered July 10, 1947. Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. Section 347(a)).

---

*Numbers in parenthesis refer to pages of the transcript of record.

Statement

This action to recover some $900,000 on various and alternative claims of conversion and money had and received was commenced in the Supreme Court of the State of New York, County of New York, by levy of an attachment against an alleged "debt" of approximately $450,000 owing respondent, a Belgian corporation doing no business in the United States, by a third party, Compagnie Maritime Belge (Lloyd Royal) S. A., sometimes referred to as the "Belgian Line", also a Belgian corporation. The writ of attachment was served on the representative of said third party in the United States, and subsequently purported service by publication was completed. Respondent has not appeared generally, no answer has been filed, and respondent appears in this Court solely for the purpose of opposing the petition for a writ of certiorari.

Following removal by respondent of the action to the Federal Court, respondent moved to vacate the warrant of attachment upon the ground that the papers upon which it was granted were "insufficient in that they did not establish a *prima facie* cause of action against defendant". The order (54-56) entered on the decision granting said motion and dismissing the complaint (50-53) was affirmed by the Circuit Court of Appeals for the Second Circuit (61-77), and petitioner seeks review of such order.

The petitioner's claim as set forth in the complaint and amplified by his affidavit in support of the attachment may be summarized as follows:

It is alleged that petitioner was at the time of the incidents in issue and is now a resident of the State of New York (18), but it appears that at the time of said incidents

he was actually a German national (petition for certiorari, p. 2) and, according to petitioner's brief in the Circuit Court of Appeals, he did not become an American citizen until 1940, long after the events in question transpired. Respondent is a foreign corporation existing under the laws of the Kingdom of Belgium (18). Petitioner was and is the sole owner of the entire capital shares of Arnold Bernstein Schiffahrtsgesellschaft, m.b.H., a German limited liability company, also known as the Arnold Bernstein Line, and, as such, was and is "solely entitled to the assets of the Arnold Bernstein Line in any liquidation thereof" (19). In 1937, petitioner, while in Hamburg, Germany, "on business of the Line which had headquarters there" was forcibly taken into custody by "Nazi officials" and "imprisoned" in a "jail", remaining in imprisonment until July, 1939 (12, 19). During his imprisonment "false charges" of violation of certain German Foreign Exchange Laws were made against him (12); no reference, significantly, is made as to the nature or outcome of such charges.

While so "imprisoned" he was compelled by "said Nazi officials" to execute documents purporting to transfer the entire capital shares of the Line to one Marius Boeger, a "Nazi designee" and "trustee" (12, 13, 19). This was accomplished by duress and by unlawful threats of severe bodily harm, indefinite imprisonment and death, business ruin, confiscation of his property and reprisals against his family (12, 19).

Petitioner, it is further claimed, being of the Jewish faith and aware of the Nazi "program of elimination of so-called non-Aryans", executed such documents of transfer solely by reason of such threats and duress and, accordingly, said documents were and are null and void (12, 19).

It is further alleged that the said Nazi "trustee" after taking such wrongful possession of the assets of the Line, including one of its ships, the "S. S. Koenigstein" (also known as the "S. S. Gandia"), sold the ship to respondent unlawfully and without fair and adequate consideration, respondent purchasing the ship knowing, or being in a position to know, of the alleged means by which the Nazi liquidator secured the vessel (13, 20).

Finally, it is asserted that subsequent to the acquisition of said vessel by respondent from the Nazi designated "trustee" in June, 1939, the vessel was chartered to the Belgian Line, later requisitioned for war purposes, and, while under charter in 1942 to the British Ministry of War Transport, was sunk (13). The proceeds of insurance, approximating $450,000, were paid by the Belgian Government to said Belgian Line for the account of respondent, these funds being the so-called "debt" of the Belgian Line to respondent which petitioner attempted to attach by serving a warrant upon the New York representative of said Belgian Line.

Questions Presented

The questions actually presented are:

1. Whether the Court below erred in finding, as did also the District Court, that the acts of coercion alleged in the complaint and affidavit supporting the attachment clearly constituted acts of the then sovereign German Government.

2. Whether the Court below erred in holding that the doctrine that courts of the United States will not review the acts of a foreign sovereign government done

within its own territory is applicable under the facts of this case.

Summary of Argument

I.

The Courts below correctly interpreted petitioner's complaint as challenging the acts of the sovereign German Government and certiorari should not be granted merely to review that interpretation.

II.

The Courts below correctly applied to the facts in this case the well settled principles that the courts of the United States will not review the acts of a foreign sovereign government done within its own territory, and held this principle applicable to preclude inquiry into acts of the recognized sovereign German government. The fundamental philosophy underlying the principle would be entirely disregarded if inquiry were first made to determine whether in the particular case the court approves the acts in question. No adequate reasons for reconsiderating this principle are presented.

Point I

PETITIONER'S PLEADING WAS CORRECTLY INTERPRETED BELOW. THERE IS NO NEED FOR RE-INTERPRETATION.

Petitioner's most persistent argument is that the Courts below misinterpreted the factual basis of his claim as set forth in the complaint and the supporting affidavit, in find-

ing that acts of the German Government only, rather than of private individuals were alleged. Petitioner's claim was fully stated in what may be assumed to have been a way most favorable to him in a complaint and affidavit prepared at leisure before suit began. The argument that the clear charge of official action should be interpreted to charge private action, rejected by both courts below, is mere afterthought. In this connection the District Court said (53):

> "It is clear from a reading of the complaint and affidavit that the acts of which the plaintiff now complains were the studied and deliberate acts of the German Goverment under the Nazi regime. *To hold otherwise would be to pervert the ordinary meaning of the words used.* These acts were performed within German territory and are not subject to review in our courts" (Italics ours).

With equal emphasis, the Circuit Court of Appeals demonstrated through petitioner's own language that petitioner alleged governmental acts (64-65).

Since the two lower courts have agreed on this interpretation of the facts, there should be no occasion for further review by this Court. Cf. *United States* v. *Commercial Credit Co.,* 286 U. S. 63, 67 (1932); *Page* v. *Arkansas Natural Gas Corp.,* 286 U. S. 269, 271 (1932); *Texas & N. O. R. R. Co.* v. *Brotherhood of Railway & S. Clerks,* 281 U. S. 548, 558 (1930).

This Court has repeatedly stressed the fact that the purpose of review by writ of certiorari is to settle important principles of law, not to afford an opportunity for a further consideration of whether a proper decision has been reached upon the facts in the particular case. *United States* v. *Johnston,* 268 U. S. 220 (1925); *Southern Power Co.* v.

N. C. Public Service Co., 263 U. S. 508 (1924); *Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923). Thus petitioner's arguments, so largely addressed to factual details, do not justify granting the petition.

Further pressing his argument that the lower courts failed to recognize the true facts of his claim, petitioner contends that there was error in failing to view his statements in the complaint and affidavit with sufficient liberality. Since jurisdiction of the respondent here depends solely on attachment remedies available only in the State Court, validity of the attachment must be tested by State rules. As noted by the Court below, Rule 64 of the Federal Rules of Civil Procedure (Appendix hereto) permits no other course.*

Under the law of New York, applicable here, in order to obtain the drastic remedy of attachment, here invoked in aid of a foreign cause of action against an absent foreign defendant, the burden was on petitioner "to submit affirmative proof that he has a good cause of action" (*McCarthy* v. *Reichsbank*, 259 App. Div. 1016, affd., 284 N. Y. 739),

*The latter part of Rule 64 of the Federal Rules of Civil Procedure, referred to by petitioner (petition pp. 18-19), providing that Federal rules shall govern procedures generally following removal, clearly cannot override the preceding provision of the same Rule that all remedies (including attachment) providing for seizure of property to secure satisfaction of a judgment are available "under the circumstances and in the manner provided by the law of the state in which the district court is held". And this interpretation has long been applied by the Federal Courts. *Mayer* v. *Hungarian Commercial Bank of Pest*, 21 F. Supp. 144 (E.D. N.Y. 1937); *Auerbach* v. *Internationale W. Lampen A. Gesellschaft*, 177 Fed. 458 (C.C., S.D. N.Y. 1910) see *Davis* v. *Ensign Bickford Co.*, 139 F. (2d) 624 (C.C.A. 8th, 1944); *Cold Metal Process Co.* v. *McLouth Steel Corp.*, 126 F. (2d) 185 (C.C.A. 6th, 1942); *Kehaya* v. *Axton*, 30 F. Supp. 838 (S.D. N.Y. 1940).

or, as was stated by New York State's highest court in its latest decision on the subject, and relied upon by the Court below, an attachment will not stand if the papers upon which it is based "clearly indicate that plaintiff must ultimately fail".*

The reasons for such strict requirements are clear. Attachment is an extraordinary remedy. The harshness of its application, a factor unquestionably influencing the Courts below, is well illustrated herein. Respondent, a Belgian corporation, maintains no office or agent in the United States, never has and does not now engage in business in the United States, and herewith is defending a suit all of whose incidents in question arose in Europe and whose determination involves foreign law exclusively. Only by the merest coincidence did petitioner achieve even a colorable attachment of an alleged "debt" owing respondent, a Belgian corporation, by a third party, likewise a Belgian corporation. Throughout the period of this suit almost half a million dollars of its assets are frozen and of no present use to it due to the fact that petitioner once used words in his attachment papers which he has ever since endeavored unsuccessfully to disown.

The authorities cited by petitioner as justifying extreme liberality of construction of his statement of claim properly apply only to motions involving genuine demurrers, i.e., motions to dismiss the complaint for failure to state a cause

---

*_Wulfsohn_ v. _Russian Republic_, 234 N. Y. 372 (1923). See also _Auerbach_ v. _Internationale W. Lampen A. Gesellschaft_, 177 Fed. 458 (C.C., S.D. N.Y. 1910); See also _Georgis_ v. _Giocalis_, 225 App. Div. 577, 233 N. Y. Supp. 16 (1st Dept., 1929); _Miller Bros. Construction Co., Inc._ v. _Thew Shovel Co._, 248 App. Div. 150, 288 N. Y. Supp. 944 (1st Dept., 1936) _appeal denied_, 272 N. Y. 678.

of action upon which relief can be granted, and are not applicable here. Respondent's motion was specifically directed to the insufficiency of the attachment (5-6).

In any event, petitioner's argument on this point is disposed of by the fact that the Courts below found that not only had petitioner failed to make out a *prima facie* case, but that his papers affirmatively indicated that ultimately he must fail in the action (53, 65).

Petitioner repeatedly suggests that he has in some way been deprived of his "day in court" by disposition of the action on a "preliminary motion" (petition, pp. 5, 6, 7, 9, 18 and 24). There was nothing unusual in the procedure followed which was expressly authorized by the New York and Federal Practice.* New York Civil Practice Act § 949 (Appendix hereto); Federal Rules of Civil Procedure, Rule 64 (Appendix hereto). Petitioner refuses to recognize that because the attachment was defective he has failed even to obtain jurisdiction over the defendant and to establish his right to any hearing of his claim on the merits.**

Petitioner's unwarranted attack on procedure in the Courts below merely adds emphasis to the fact that he is

---

*For cases to that effect see footnote page 14 hereof.

**Another example of petitioner's confusion as to the procedure involved herein is his insistence that the Court below had no power to dismiss the complaint (petition, pp. 24-25). Clearly, the only conceivable basis for jurisdiction here is the purported attachment of respondent's property. Upon vacating said attachment, such jurisdiction must necessarily fall and the complaint automatically fails for lack of jurisdiction. Moreover, no opportunity is permitted petitioner to repair the fatal defects in his attachment papers by amending the complaint or supplying supplemental affidavits. Such additional material cannot possibly retroactively cure an initially defective attachment. *Grassi* v. *LaSociedad Bancaria Del Chimborazo*, 213 App. Div., 629, 210 N. Y. Supp. 705 (1st Dept. 1925); *Wade* v. *Gates Rubber Co.*, 205 App. Div. 17, 20, 199 N. Y. Supp. 16, 18 (1st Dept. 1923).

seeking reinterpretation of his pleading, and thus a fresh review of the particular facts is unnecessary.

Point II.

THE COURTS BELOW CORRECTLY APPLIED THE DOCTRINE THAT OUR COURTS WILL NOT INQUIRE INTO THE ACTS OF A SOVEREIGN GOVERNMENT.

The rule that the courts of this country will not review acts of a foreign sovereign government* done within its own territory has been firmly established by decisions over a long period of time which embraces sweeping changes in political, economic and idealogical environment and thought. History and sober judgment have taught that the highest considerations of national and international policy demand that redress of individual grievances such as are involved herein through the medium of the courts of this country must be denied. The Courts below correctly concluded that no amount of sympathy for the plight of those subjected to injustice at the hands of the German Government justify departure from the settled rule.

The very essence of that principle is non-inquiry into such sovereign acts and refusal of the courts to consider whether or not any particular act should be disturbed, irrespective of personal feelings or convictions with re-

---

*The Court may take judicial notice of the fact, and Department of State records indicate, that throughout the entire period significant here (January, 1937 to July, 1939) the Nazi Government was not only the *de facto* but the *de jure* government of Germany, accorded full recognition as such by the Government of the United States (*Underhill* v. *Hernandez,* 168 U. S. 250, 253 (1897)), which recognition continued until December 11, 1941.

spect to the act in question. Petitioner's narrow view that a determination of his claim would be innocuous because Germany is in no position to retaliate and for other appealing reasons arising from the specific factual situation does not dispose of the obviously broader and compelling considerations of higher policy here present. Proper conduct of international relations generally requires absolute recognition of sovereign acts and respect of sovereign independence.

In spite of the detailed development of this principle of law, petitioner unsuccessfully attempts to find a reason for denying its applicability here. The fact that it does apply is amply shown by authority refuting every contention petitioner makes in this respect. The element of personal malice which petitioner seeks to introduce (petition, p. 12) is excluded by the allegations that the Nazi program of persecution was directed against the Jewish race as a whole (20), as, indeed, the world knows was the case. The applicability of the principle is not affected by the fact that the acts in question were done through civil rather than military officers (*Banco de Espana* v. *Federal Reserve Bank of New York*, 114 F. (2d) 438 (C. C. A. 2d (1940)), *Underhill* v. *Hernandez*, 168 U. S. 250, 253 (1897); that such acts may be in flagrant violation of the law of the country where accomplished (*Banco de Espana* v. *Federal Reserve Bank of New York, supra;* Cf. *Union Shipping & Trading Co.* v. *United States*, 127 F. (2d) 771, 774 (1942)); that such acts may be utterly repugnant to our own laws and principles (*Underhill* v. *Hernandez, supra; American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357 (1909); *United States* v. *Belmont*, 301 U. S. 324, 329 (1937); *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 376 (1923), *appeal dismissed*, 266 U. S. 580; *Holzer* v.

Deutsche Reichsbahn-Gesellschaft, 277 N. Y. 474, 479 (1938); that the government official who did the act is claimed to have acted beyond the scope of his authority (*American Banana Co.* v. *United Fruit Co., supra,* 359); that the rights of an American citizen were involved (*Ricaud* v. *American Metal Co.,* 246 U. S. 304 (1918); *Underhill* v. *Hernandez, supra*); that the sovereign government in question was the German government, an enemy of this country (*Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft,* 182 Misc. 776, 45 N. Y. S. (2d) 882 (Sup. Ct., N. Y. Co. 1943)); or that the government in question subsequently was overthrown (*Williams* v. *Bruffy,* 96 U. S. 176, 185 (1877); *Guaranty Trust Company* v. *United States,* 304 U. S. 126, 139-141 (1938); *Banco de Espana* v. *Federal Reserve Bank of New York, supra; Underhill* v. *Hernandez, supra.*

Petitioner concedes, as he must, that acts of the Executive in this sphere are binding upon our courts (petition, p. 15). That prerogative is not abandoned by the executive merely by the Executive's indication of policy to be followed, but only by a positive expression of its intent to do so. All aspects of petitioner's claim, even after settlement thereof, are and must continue to be inextricably bound up with the most complex international problems. The fact that the Executive has begun to act only strengthens the reasons for the courts' abstention. The confusion which would be introduced by intervention of the courts after the Executive has begun to deal with such claims may be of even more serious import than the reasons barring consideration by the courts before the Executive has begun to act.

The issue is not whether some policy capable of application to petitioner's claim may be discerned from what the

Executive has done, but whether the Executive has explicitly expressed the intention that the courts be relieved of the restriction on their consideration of the vast mass of such and related claims.* This fundamental point was clearly recognized and conclusively developed by the Circuit Court of Appeals in its opinion (69-71).

Furthermore, it must be remembered that jurisdiction herein depends solely upon an attachment issued by a state court. Obviously, intervention of a state court cannot be permitted to jeopardize or interfere with the conduct of foreign relations of the United States. (See Circuit Court of Appeals opinion, Record p. 71). Such interference would indeed, in the words quoted by petitioner "tend to disturb that equilibrium of our foreign relations which the political departments of our national government had diligently endeavored to establish". *United States* v. *Pink*, 315 U. S. 203, 233 (1941).

The arguments of petitioner resolve themselves into an attempt to persuade our courts to substitute their views on delicate international questions of a high order, involving, among other things, existing and future relations with other

---

*In fact, the Executive has expressed a directly contrary intent. Law No. 5 of the Allied Control Council for Germany, October 30, 1945 (not applicable to petitioner's claim) vests in a German External Property Commission (Art. I) all interests in property outside Germany (with certain exceptions) owned or controlled by any German national or German business, corporation or legal entity (Arts. II and III) and makes it a punishable criminal offense to do or attempt to do anything in derogation of the Commission's title or interest in such property (Arts. XI, XII). Official Gazette of the Control Council for Germany, No. 2, Nov. 30, 1945, pp. 27-31.

Nothing can be gained by burdening the brief with analysis of the many acts, rulings, pronouncements, etc. of officials regarding control in Germany. One example suffices to indicate the trend of executive action.

nations, reparations, a history of past consummated transactions, economic readjustments and the like for the machinery of the executive branch of our government whose sole constitutional province it is. Such is not and cannot be the function of the judicial process and, indeed, in recent years the courts have consistently rejected such suggestions in cases involving Nazi persecution of Jewish nationals which had a similar appeal to that arising from the facts as alleged by petitioner.* Neither there nor here is there any basis whatever for reversing or distinguishing the line of cases relied upon by the Courts below.

CONCLUSION

The case was correctly decided below; there is no conflict of decisions and, as the decision below depends on particular facts, it is of no general importance. The Court has so often set forth and applied the principles of law here involved that no further consideration thereof is now needed. The petition for a writ of certiorari should be denied.

Respectfully submitted,

LOUIS CONNICK,
Counsel for Respondent,
Appearing specially.

SIMPSON THACHER & BARTLETT,
Of Counsel

September 10, 1947

---

*See *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474 (1938), *McCarthy* v. *Reichsbank*, 259 App. Div. 1016, affd. 284 N. Y. 739 (1940), *Eisner* v. *Vereinigte Industrie-Betriebe Fuer Den Osten*, 61 N. Y. S. (2d) 110 (1946), all of which cases, as here, were decided on preliminary motions directed to the pleadings, *Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft*, 182 Misc. 776, 45 N. Y. S. (2d) 882, (1943).

APPENDIX

Rules of Civil Procedure—Rule 64

"RULE 64. SEIZURE OF PERSON OR PROPERTY

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Civil Practice Act—Section 949

"§ 949. How and to whom application shall be made; new proof. An application, specified in the last section, may be founded only upon the papers upon which the warrant was granted; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper. Or it may be founded upon proof on the part of the defendant; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to any judge of the court, upon notice. If founded wholly or partly upon proof, it may be opposed, as a matter of course, by new proof on the part of the plaintiff."